IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6497 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH
and
Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BANIAN & BERRY BEARING PVT. LTD.

Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 6497 of 2002

MR PARESH M DAVE for Petitioner No. 1-2

MR DN PATEL for Respondents

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE K.A.PUJ

Date of decision: 05/08/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

Rule. Mr DN Patel, learned senior standing counsel waives service of Rule for the respondents.

2. In this petition under Article 226 of the

Constitution, the petitioners have challenged the order dated 3.7.2002 passed by the Deputy Commissioner, Central Excise, Division-Rural-I, Ahmedabad-II which is produced at Annexure "E" to the petition.

3. The facts leading to filing of this petition, briefly stated, are as under :-

The petitioner-Company is discharging central excise duty on fortnightly basis as per the proviso to Rule 49 of the central Excise Rules, 1944. On various occasions, the petitioners did not have sufficient balance in their outstanding duty on the due dates for payment of duty. The sum total of outstanding duty on the due dates was Rs.16,15,569/-. This outstanding amount was paid later on different occasions alongwith due interest from the CENVAT account. The petitioners were served with the show cause notice dated 29.11.2001 calling upon the petitioners to show cause why the aforesaid amount of excise duty should not be recovered from the petitioners through the current account; to show cause why interest at the prescribed rate should not be charged and recovered from the petitioners and why penalty should not be imposed upon the petitioners under Rule 173Q(1)of the Central Excise Rules, 1944 for the contravention of Rules 49, 57AB and 173G of the Rules. The show cause notice was issued on the ground that the outstanding amount paid beyond due dates should have been paid through the PLA (Personal Ledger Account) and was not permitted to be paid through CENVAT account in view of the provisions of erstwhile Rule 57AB. The particulars of the amounts involved, the dates on which the amounts were due, the date on which the amounts were actually paid, the amounts of interest discharged through the petitioners' CENVAT account and the dates on which the interest is discharged in the said account are to be found in para 3 of the order at Annexure "D" to the petition.

After hearing the petitioners' reply, the Additional Commissioner, Central Excise (Tech.), Ahmedabad-II held that the payment of outstanding amount of duty alongwith interest for the delay from the CENVAT account did not involve any irregularity per se and hence the show cause notice failed. That order is produced at Annexure "D" to the petition. Thereafter, the Deputy Commissioner, Central Excise, respondent No. 2 herein, has passed order dated 3.7.2002 (Annexure "E") stating that the assessee-petitioner had defaulted in payment of instalments due for the relevant fortnights and, therefore, the petitioner-Company has forfeited the

facility to pay the dues in instalments under erstwhile Rule 173G(1)(3) of the 1944 Rules and under Rule 8(4) of the Central Excise (No. 2) Rules, 2001 for a period of two months from the date of service of the order. During the said period, the petitioner is required to pay excise duty for each consignment by debit to the account current i.e. through PLA only and in the event of any failure, it shall be deemed that such goods have been cleared without payment of duty. In short, during this period, the petitioner is not to be allowed to utilize CENVAT credit for discharge of central excise duty.

4. Mr PM Dave, learned counsel for the petitioners has submitted that prior to 18.8.2000, under the erstwhile scheme the petitioners were permitted to clear the goods by taking credit for the sums lying in the CENVAT account. The petitioners could take credit of the excise duty paid on the inputs till the date of payment through the CENVAT account, but the scheme was changed from 18.8.2000 under which the duty paid on the inputs received by the assessee within the relevant fortnight only was to be taken into account and not the duty paid on the inputs received by the assessee after expiry of the fortnight but before the credit was taken from the CENVAT account. In view of the recent change in the scheme, there was delay of only a few days between November 2000 and March 2001. However, this very controversy was examined by the Additional Commissioner while passing the order dated 28.5.2002 (Annexure "D") and the Commissioner had explained the scheme of the amended rule in terms of the illustration given in para 8 of the order. The Additional Commissioner had also noted that the petitioners had paid interest for the delayed payments and, therefore, respondent No. 2 has erred in passing the impugned order dated 3.7.2002 at Annexure "E" to the petition.

5. On the other hand, Mr DN Patel, learned senior standing counsel for the revenue has submitted that under Rule 49(e)(ii) the manufacturer who commits three defaults in a financial year is liable to forfeit the facility to pay the dues in instalments under the CENVAT scheme and, therefore, respondent No. 2 has passed the impugned order dated 3.7.2002 at Annexure "E" to the petition.

6. Having heard the learned counsel for the parties, it appears to the Court that the Additional Commissioner, Central Excise (Tech.), Ahmedabad-II had gone into the entire controversy and had held that the show cause notice dated 29.11.2001 had failed and, therefore, notice

was discharged. The impugned order dated 3.7.2002 at Annexure "E" is based on the same facts which were the subject matter of the show cause notice dated 29.11.2001. A bare perusal of the contents of Annexure "A" to the show cause notice (Annexure "C") and the dates given in the impugned order at Annexure "E" more than substantiate the petitioners' case that the impugned order is based on the same facts on the basis of which the show cause notice dt. 29.11.2001 was issued which culminated into the Additional Commissioner's order dated 28.5.2002. The following dates will indicate the extent of delay :-

Sr. No.	Due date for payment of duty	Date on which liability actually discharged/duty paid.
1.	05.12.2000	07.12.2000
2.	20.12.2000	30.12.2000
3.	05.01.2001	13.01.2001
4.	20.02.2001	23.02.2001
5.	05.03.2001	07.03.2001

A bare perusal of the above dates indicates that the delay was very nominal and for the delayed payments, the petitioners had already paid interest at the rate of 24%.

7. Para 8 of the Additional Commissioner's order dated 28.5.2002 explains that no prejudice was caused to the revenue on account of the delay which was for a very short period. The said para reads as under :-

"8. An illustration would be sufficient to explain the above proviso. Suppose an assessee has to pay a duty of Rs.1,00,000/- for the period 01.01.2000 to 15.01.2000 but he had only Rs.80,000/- in balance in his Cenvat account on 15.01.2000. He brings in fresh inputs on 18.01.2000 which involve a Cenvat credit of Rs.50,000/-. As on 20.01.2000, he has a balance of Rs.1,30,000/- in his Cenvat account while has has to pay duty of Rs.1,00,000/- only. It is in such a situation only that the said proviso comes into play. Now, according to the said proviso, the Cenvat credit by the assessee can be utilized

> only to the extent which was available on 15.01.2000 i.e. Rs.80,000/-. Therefore, the amount of Rs.20,000/- will remain outstanding for the said fortnight, and the same will have to be paid along with interest in terms of relevant portion of Rule 49 reproduced earlier in this order. There is no bar anywhere for payment of this outstanding amount from the credit of Rs.50,000/- which has been earned later provided the due interest is also paid. It would be absurd to suggest that Cenvat account cannot be utilized for payment of arrears of outstanding duties. The interest on duty in terms of Rule 49 partakes the character of duty and hence it too can be paid from the Cenvat credit without any separate account."

However, considering the fact that in para 8 of the order dated 28.5.2002 the Additional Commissioner has already explained the provision of the Rule and looking to the extent of the delay and the principle of "Lex non curat de minimis" (the Law does not care for trifles), the Additional Commissioner was justified in discharging the notice and in this view of the matter, the Deputy Commissioner, Central Excise also ought not to have issued the order dated 3.7.2002 especially when the delay was very marginal and the duties were already paid by the petitioners with 24% interest.

8. Relying on the principle of "Lex non curat de minimis", we are of the view that the petitioners could not have been deprived of the facility to pay the dues in instalments under erstwhile Rule 173G(1)(e) of the Central Excise Rules, 1944 and under Rule 8(4) of the Central Excise (No. 2) Rules, 2001 on the basis of the aforesaid facts.

9. The petition is, therefore, allowed. The impugned order dated 3.7.2002 at Annexure "E" to the petition is hereby quashed and set aside.

Rule is made absolute with no order as to costs.

(M.S. Shah, J.) (K.A. Puj, J.)

sundar/-